OPINION ENTERED: March 8, 2013

CLAIM NO. 200373825

BRAD MURPHY PETITIONER

VS. **APPEAL FROM HON. WILLIAM J. RUDLOFF, ADMINISTRATIVE LAW JUDGE**

JUNCTION CITY VOLUNTEER FIRE DEPT.
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
VACATING AND REMANDING

* * * * * *

BEFORE: ALVEY, Chairman; STIVERS and SMITH, Members.

ALVEY, Chairman. Brad Murphy ("Murphy") seeks review of the Opinion and Order rendered October 8, 2012 by Hon. William J. Rudloff, Administrative Law Judge ("ALJ") finding his condition had worsened, and awarding increased permanent partial disability ("PPD") benefits for injuries he sustained on September 7, 2003, while working for the

Junction City Volunteer Fire Department ("Junction City"). Murphy also appeals from the Amended Opinion and Order on Reconsideration rendered November 19, 2012.

On appeal, Murphy argues the ALJ failed to make a determination of his impairment, the appropriate factors, and any applicable multipliers pursuant to KRS 342.730 (1)(c)1, or KRS 342.730(1)(c)2 at the time of settlement, contrasted with a similar analysis of his condition at the time of reopening. Murphy also argues the ALJ failed to provide any discussion or explanation of why he rejected the report of Dr. Robert P. Granacher. Finally, Murphy argues the ALJ must determine benefits, and the application of the appropriate factor for his entire impairment at the time of reopening, not just the amount of increase.

We vacate and remand the ALJ's decision because he failed to determine Murphy's impairment at the time of settlement, and failed to make the appropriate analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), compared with his condition at the time of reopening. The ALJ also failed to provide any analysis for his rejection of the reports of Drs. Granacher and Richard Sheridan. Finally, the ALJ erred in his application of the appropriate statutory factor pursuant to KRS 342.730(1)(b).

Murphy testified by deposition on June 19, 2012, and again at the hearing held August 28, 2012. The parties referenced Murphy's deposition taken in the original claim, but it was never filed into evidence by either party. Murphy was born on September 4, 1965, and is a resident of Junction City, Kentucky.

On July 9, 2003, Murphy was fighting a fire from a second floor balcony, when it collapsed and fell on top of him. Murphy lost consciousness, and awakened as he was being tended to at the scene. He again lost consciousness, and awakened in the emergency room of the Ephraim McDowell Regional Medical Center.

On August 16, 2007, Murphy filed a Form 101 alleging injuries to his low back, right leg, left shoulder, head, brain, chest, and ribs. He also asserted he has dysmetria associated with vertigo, and a psychological impairment due to the September 7, 2003 fall. The claim was later amended to include a mid-back injury. Murphy is a high school graduate with specialized training in tool and die, firefighting, emergency medical technician, and fire instructor. Murphy has been employed as a tool and die maker at Hitachi Automotive, located in Harrodsburg, since 1997.

In support of the Form 101, Murphy filed the September 7, 2003 records from the Ephraim McDowell Regional Medical Center outlining treatment for the injuries he sustained in the fall, and noting he had sustained a concussion. Murphy also filed the July 17, 2007 neuro-psychological report of Dr. C. Christopher Allen, Ph.D., who diagnosed cognitive disorder, not otherwise specified; generalized anxiety disorder; and pain disorder associated with both psychological factors and a general medical condition. Dr. Allen determined the psychological complaints were caused by the work accident, and assessed a 15% impairment rating pursuant to the American Medical Association Guides to Evaluation of Permanent Impairment, 2nd Edition ("AMA Guides 2nd").

On February 5, 2008, Donna H. Terry, Administrative Law Judge, approved a Form 110-I settlement agreement, wherein the parties agreed to settle the claim based upon a 22% impairment rating[1]. Murphy agreed to settle his claim for weekly payments of $216.87 per week, arrived at by the following calculation: $428.57 x 22%(compromised rating) x 1.15 (factor pursuant to KRS 342.730(1)(b))x 2 (presumably a compromised multiplier

[1] Presumably a compromised impairment rating based upon the American Medical Association Guides to Evaluation of Permanent Impairment, 5th Edition ("AMA Guides").

pursuant to KRS 342.730(1)(c)2)=$216.87. The agreement listed impairment ratings of 20% impairment assessed by Dr. James Owen on January 29, 2007[2]; a 19% assessed by Dr. Sheridan on October 31, 2006; and, a 5% assessed by Dr. Granacher on October 25, 2007.

On January 30, 2012, Murphy filed a motion to reopen alleging a worsening of condition/increased impairment rating. On March 21, 2012, Chief Administrative Law Judge, J. Landon Overfield, entered an order reopening the claim. On April 18, 2012, an order was issued by the Department of Worker's Claims, scheduling a benefit review conference ("BRC"), and assigning the claim to the ALJ.

Murphy testified he continues to work for Hitachi Automotive in Harrodsburg, Kentucky, as a tool and die technician, the same job he held in 2003, earning the same or greater wage than he earned on the date of injury. He has had no formal education or training since he was injured in the September 2003 fire. He testified the surgery performed in 2005 alleviated some of his low back pain. However, he continues to experience some degree of pain since the injury, with occasional flare-ups, most recently in 2010 and 2012. He stated he has sustained no additional

[2] Although the Form 110-1 listed the date as January 29, 2007, the Form 107-I report was dated July 17, 2007.

low back injuries since the settlement in 2008, but the pain radiates further down his leg than it did at that time. He also noted continuing neck and shoulder pain. He stated his left shoulder pain has worsened, and he has experienced vertigo since the injury. He further testified he no longer feels as secure in continued employment at Hitachi Automotive as he did when he settled his claim in 2008, due to absenteeism from his injuries. He also testified although he has continued to work as a tool and die maker since the accident, he requires assistance with lifting, is limited in the jobs he can perform, and his work is confined to the shop area only.

In support of the reopening, Murphy filed 107-I reports of Dr. Owen dated July 17, 2007, and January 11, 2012. In the report dated July 17, 2007, Dr. Owen noted the September 2003 injury, and diagnosed Murphy with persistent neck pain and muscle spasm with dysmetria associated with vertigo, and status post L-5, S-1 radiculopathy with discectomy, and no evidence of fusion. Dr. Owen assessed a 20% impairment rating pursuant to the AMA Guides, and outlined restrictions of no lifting, handling or carrying objects in excess of twenty pounds, and he should not engage in activity requiring recurrent bending, squatting, stooping or looking up in a persistent or forceful manner. He

further opined Murphy did not retain the capacity to return to the type of work he performed on the date of the injury.

In the January 11, 2012 report, Dr. Owen diagnosed recurrent low back pain and radiculopathy in the same area as the previous discectomy, involving both the right and left legs. Dr. Owen noted: "There very well may be a worsening of the condition, even more so than is seen on the most recent MRI." He also noted chronic vertigo, left shoulder pain with diminished range of motion, and persistent neck pain with dysmetria and muscle spasm. Dr. Owen assessed a 29% impairment rating pursuant to the AMA Guides, and assessed restrictions of no lifting, handling, or carrying objects greater than twenty pounds, and he should avoid recurrent bending, squatting and stooping, and should be allowed to sit or stand at his discretion.

Murphy also filed the November 1, 2007 report of Dr. Granacher, a neuro-psychiatrist from Lexington. Dr. Granacher diagnosed mild cognitive disorder in the attentional realm, due to the concussive brain injury sustained on September 7, 2003. Dr. Granacher assessed a 5% impairment rating pursuant to the AMA Guides, 2nd.

Junction City filed Dr. Sheridan's December 4, 2007, and June 25, 2012 reports who evaluated Murphy twice at its request. On December 4, 2007, Dr. Sheridan diagnosed

Murphy with acute cervical strain, closed head injury with temporary loss of consciousness, injury to the vestibular system resulting in vertigo, herniated disc at L5-S1, thoracic sprain and contusion to right leg, and a left shoulder strain. He assessed a 19% impairment rating pursuant to the AMA Guides. He recommended restrictions of no lifting, pushing or pulling of over ten to twenty pounds frequently or over twenty to fifty pounds infrequently. He also recommended no rapid work, no climbing ladders or scaffolds, and only occasional bending, stooping, rotating at the waist, or reaching from floor to waist.

In his June 25, 2012 report, Dr. Sheridan noted complaints of neck and low back pain, with intermittent paresthesias to the fingers, with pain down the left arm. He diagnosed acute cervical strain, closed head injury with temporal loss of consciousness, an injury to the vestibular system resulting in vertigo, herniated disc at L5-S1, thoracic sprain, contusion to the right leg, and chest wall, and acute left shoulder strain. He noted Murphy had reached maximum medical improvement ("MMI"), and assessed a 19% impairment rating pursuant to the AMA Guides. He imposed no restrictions in addition to those previously assessed.

A BRC was held August 8, 2012. The BRC order and memorandum listed the contested issues as the application of

KRS 342.125 and KRS 342.730 worsening of impairment/ disability; unpaid medical bills; work-relatedness/ causation; waiver/bar of left shoulder and neck claim. It was also noted Murphy continues to work at the same or greater rate of pay.

In the Opinion and Order rendered November 19, 2012, the ALJ determined the following:

> **SECTION V – FINDINGS OF FACT AND CONCLUSIONS OF LAW**
>
> **A. Work-relatedness/causation.**
>
> KRS 342.0011(1) defines an "injury" to mean any work-related, traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. KRS 342.0011(33) defines "objective medical findings" to mean information gained through direct observation and testing of the patient applying objective or standardized methods.
>
> Based on the totality of the evidence in the record, including the plaintiff's sworn testimony and the medical reports of both Dr. Owen and Dr. Sheridan and the stipulations entered into by the parties at the Benefit Review Conference, I make the factual determination that the plaintiff sustained work-related injuries on September 7, 2003 while employed by the defendant.

B. Application of KRS 342.125 and KRS 342.730 and worsening of impairment/disability.

KRS 342.125(1) provides that upon motion by any party or upon an administrative law judge's' own motion, an administrative law judge may reopen and review any award or order [for]. . .[c]hange of disability *as shown by objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order*.

As the fact finder, the administrative law judge has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence. *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993); *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). The administrative law judge also has the sole authority to judge the weight to be afforded to the testimony of a particular witness. *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46, 47 (Ky. 1974). When conflicting evidence is presented, the administrative law judge may choose whom or what to believe. *Pruitt v. Bugg Bros.*, 547 S.W.2d 123, 125 (Ky. 1977). Furthermore, the administrative law judge may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000).

I saw and heard Mr. Murphy testify at the hearing. He was a credible and convincing witness. I also found Dr. Owen's January 25, 2012 medical report to be very persuasive, especially in

regard to his diagnoses and permanent impairment rating of 29% to the body as a whole under the AMA Guides, Fifth Edition, as contrasted with 20% in 2007. I also found very persuasive Dr. Owens' opinion that the plaintiff does not retain the physical capacity to continue working as a tool and die maker and that Mr. Murphy should not lift, handle or carry objects more than 20 pounds and should avoid recurrent bending, squatting and stooping and should be given allowance to stand or sit at his discretion.

Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), and its progeny require an Administrative Law Judge to make three essential findings of fact. First, the administrative law judge must determine whether a claimant can return to the type of work performed at the time of injury. Second, the administrative law judge must also determine whether the claimant has returned to work at an AWW equal to or greater than his pre-injury wage. Third, the administrative law judge must determine whether the claimant can continue to earn that level of wages for the indefinite future.

I make the factual determination that Mr. Murphy is marginally capable of continuing to work at the Hitachi factory. However, I also make the factual determination that Mr. Murphy cannot continue to earn his present level of wages for the indefinite future and that his ability to compete for jobs in the competitive economy is significantly impaired due to his work injuries. For all of the above reasons, I find that Mr. Murphy is entitled to enhance permanent partial disability benefits pursuant to KRS 342.730(1)(c)1.

In making my factual determination and in awarding Mr. Murphy enhanced permanent partial disability benefits, I relied on Weinstein, et al "Surgical vs. Nonoperative Treatment for Lumbar Disk Herniation, The Spine Patient Outcomes Research Trial (SPORT): A Randomized Trial," Journal of American Medical Association (Nov., 2006) Vol. 296, No. 20, PP. 2441 et seq. That learned treatise and reliable authority studied lumbar discectomy, which is the most common surgical procedure performed for back and leg symptoms in United States patients to assess the efficacy of surgery for lumbar intervertebral disk herniation. The article reviews a randomized clinical trial enrolling patients between March 2000 and November 2004 in 11 of the United States and 501 surgical candidate patients. The study concluded that patients who undergo lumbar disc surgery improve substantially. However, the study also showed that: (1) 60-70% of the patients continue to have bodily pain; (2) 70-80% of the patients continue to have limitations of physical function; (3) 70-80% of the patients had reduced work status.

In making my factual determination that Mr. Murphy cannot continue to earn his present level of wages for the indefinite future and that his ability to compete for jobs in the competitive economy is significantly impaired due to his September 7, 2003 work injuries, I also relied upon my professional experience as an attorney for 1965 to 2011, a period of 46 years, during which I handled thousands of workers' compensation and personal injury cases, hundreds of which involved lumbar disk injury and lumbar disk surgery. In the

workers' compensation cases I represented both employees and employers. I observed injured workers who had lumbar disk injuries and surgeries and saw the practical long-term effects on them over periods of 5, 10, 15 and 20 years after their surgeries. A substantial percentage of those injured workers had continuing painful symptoms, limitations in their physical function and loss of time from work, resulting in reduced work-life expectancy, and loss of time from work, i.e., occupational disability. In other words, my real world experience over a period of 46 years taught me that workers who suffer lumbar disk injuries and undergo lumbar disk surgeries such as Mr. Murphy cannot continue to earn their pre-injury level of wages for the indefinite future and cannot compete for jobs in the competitive economy, thereby resulting in significant future earnings loss or occupational disability due to their work injuries and surgeries.

For all of the above reasons, I make the factual determination that Mr. Murphy cannot continue to earn his present level of wages for the indefinite future and that his ability to compete for jobs in the competitive economy is significantly impaired due to his September 7 2003 work injuries. I, therefore, award Mr. Murphy enhanced permanent partial disability benefits pursuant to KRS 342.730(1)(c)1.

. . .

D. Waiver/bar of left shoulder and neck claim.

I agree with the defendant on this issue and make a factual determination that Mr. Murphy is not entitled to

> recover any compensation benefits for increased impairment to his left shoulder and neck, as per the Form 110 Settlement Agreement.
>
> **SECTION VI – OPINION AND AWARD**
>
> In light of the above findings of fact and conclusions of law, IT IS HEREBY ORDERED AND ADJUDGED AS FOLLOWS:
>
> A. The plaintiff has sustained a worsening of his condition since the settlement of his claim back on February 5, 2008.
>
> B. The plaintiff shall recover additional benefits based upon his increased permanent impairment of 7% to the body as a whole and enhanced permanent partial disability benefits pursuant to KRS 342.730(1)(c)1, being the difference between the 22% stated in the 2008 Form 110 and the present 29%.
>
> C. Pursuant to the provisions of KRS 342.730(1)(c)1. Plaintiff is entitled to recover an additional amount of $76.50 per week ($428.57 x .07 = $30.00 x .85 = $25.50 x 3.00 = $76.509), beginning on the date he filed his Motion to Reopen on January 30, 2012, and continuing thereafter for a period of 425 weeks from and after said date.

Both Murphy and Junction City filed petitions for reconsideration. Junction City argued the ALJ erred in awarding increased disability for 425 weeks beginning on the date of reopening, rather than for the balance of the compensable period. Junction City also argued the ALJ erred

in finding Murphy had waived his right to recover for increased impairment for the left shoulder and neck, but relied on impairment ratings assessed for those conditions in determining the increase in benefits. Junction City also argued it was error for the ALJ to rely on a medical treatise not introduced, or relied upon by either party, and for the ALJ to state he relied upon his 46 years of professional experience in assessing the three multiplier, pursuant to KRS 342.730(1)(c)1.

In his petition for reconsideration, Murphy argued the ALJ erred by failing to make a determination of his impairment and occupational disability at the time of settlement, including an analysis of the application of any multipliers, with a subsequent analysis at the time of reopening. He also argued the neck and shoulder conditions were not waived in the 2008 Form 110-I settlement agreement. Murphy argues Dr. Granacher's neuro-psychiatric impairment rating was undisputed both in the original claim and the reopening, and should be calculated into the total impairment rating, which may increase the compensable period to a total of 520 weeks, rather than 425. Murphy also argued the ALJ erred by failing to perform an analysis pursuant to Fawbush, supra, at the time of settlement.

In the Amended Opinion and Order on Reconsideration rendered November 19, 2012, the ALJ found as follows:

> **SECTION V – FINDINGS OF FACT AND CONCLUSIONS OF LAW**
>
> **A. Work-relatedness/causation.**
>
> KRS 342.0011(1) defines an "injury" to mean any work-related, traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. KRS 342.0011(33) defines "objective medical findings" to mean information gained through direct observation and testing of the patient applying objective or standardized methods.
>
> Based on the totality of the evidence in the record, including the plaintiff's sworn testimony and the medical reports of both Dr. Owen and Dr. Sheridan and the stipulations entered into by the parties at the Benefit Review Conference, I make the factual determination that the plaintiff sustained work-related injuries on September 7, 2003 while employed by the defendant.
>
> **B. Application of KRS 342.125 and KRS 342.730 and worsening of impairment/disability.**
>
> KRS 342.125(1) provides that upon motion by any party or upon an administrative law judge's' own motion, an administrative law judge may reopen and review any award or order [for]. .

.[c]hange of disability *as shown by objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order*.

As the fact finder, the administrative law judge has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence. *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993); *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). The administrative law judge also has the sole authority to judge the weight to be afforded to the testimony of a particular witness. *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46, 47 (Ky. 1974). When conflicting evidence is presented, the administrative law judge may choose whom or what to believe. *Pruitt v. Bugg Bros.*, 547 S.W.2d 123, 125 (Ky. 1977). Furthermore, the administrative law judge may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000).

I saw and heard Mr. Murphy testify at the hearing. He was a credible and convincing witness. I also found Dr. Owen's January 25, 2012 medical report to be very persuasive, especially in regard to his diagnoses and permanent impairment rating of 29% to the body as a whole under the AMA Guides, Fifth Edition, as contrasted with 20% in 2007. I also found very persuasive Dr. Owens' opinion that the plaintiff does not retain the physical capacity to continue working as a tool and die maker and that Mr. Murphy should not

lift, handle or carry objects more than 20 pounds and should avoid recurrent bending, squatting and stooping and should be given allowance to stand or sit at his discretion.

Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003), and its progeny require an Administrative Law Judge to make three essential findings of fact. First, the administrative law judge must determine whether a claimant can return to the type of work performed at the time of injury. Second, the administrative law judge must also determine whether the claimant has returned to work at an AWW equal to or greater than his pre-injury wage, but then ceases that employment. Third, the administrative law judge must determine whether the claimant can continue to earn that level of wages for the indefinite future.

I make the factual determination that Mr. Murphy is marginally capable of continuing to work at the Hitachi factory. However, I also make the factual determination that Mr. Murphy cannot continue to earn his present level of wages for the indefinite future and that his injury has permanently altered his ability to earn an income. For all of the above reasons, I find that Mr. Murphy is entitled to enhanced permanent partial disability benefits pursuant to KRS 342.730(1)(c)1. *Adkins v. Pike County Board of Education*, 141 S.W.3d 387 (Ky.App.2004).

The plaintiff's Form 101 alleged injuries to his lower back, right leg, left shoulder, neck, head, brain, chest, ribs, dysmetria associated with vertigo and psychological impairment secondary to physical injuries. Dr. Owen's July 17, 2007 report contained

diagnoses of persistent neck and muscle spasm with dysmetria associated with vertigo and status post L5-S1 radiculopathy with discectomy. Dr. Owen's 2007 medical report contained a permanent impairment rating of 20% to the body as a whole under the AMA Guides, Fifth Edition. His permanent impairment rating includes 6% to the neck, 11% to the low back and 5% to vertigo. Under the Combined Values Chart, the total permanent impairment is 20% to the body as a whole. Dr. Owen's January 25, 2012 medical report contains diagnoses of recurrence of low back pain and radicular pain same area as prior discectomy, that being L5-S1 and now also it seems to be involving the right leg as well as the left, which he says has occurred since he has seen Dr. Brooks this last time, and also chronic vertigo, left shoulder pain with diminished range of motion and persistent neck pain with dysmetria and muscle spasm. Dr. Owen's 2012 medical report has a combined value permanent impairment of 29% to the body as a whole, which breaks down to 13% to the low back, 5% for the vertigo, 1% for the left shoulder and 13% to the neck, all under the AMA Guides, Fifth Edition. I found Dr. Owen's 2012 report to be persuasive. So, the bottom line is that between the 2007 medical report from Dr. Owen and the 2012 medical report from Dr. Owen, there is an increase in permanent impairment of 9% to the body as a whole. I did not find persuasive either Dr. Sheridan's medical reports or Dr. Granacher's medical report.

For all of the above reasons, I make the factual determination that Mr. Murphy cannot continue to earn his present level of wages for the indefinite future and that his ability

to compete for jobs in the competitive economy is significantly impaired due to his September 7 2003 work injuries. I, therefore, award to Mr. Murphy enhanced permanent partial disability benefits pursuant to KRS 342.730(1)(c)1.

. . .

D. Waiver/bar of left shoulder and neck claim.

Pursuant to KRS 342.125(7), the Form 110 Settlement Agreement in 2008 does not operate as a waiver of or bar to the plaintiff's reopening for alleged worsening of his neck and left shoulder conditions. I find in favor of Mr. Murphy on this issue.

SECTION VI – OPINION AND AWARD

In light of the above findings of fact and conclusions of law, IT IS HEREBY ORDERED AND ADJUDGED as follows:

A. The plaintiff has sustained a worsening of his condition since the settlement of his claim back on February 5, 2008.

B. The plaintiff shall recover additional benefits based upon his increased permanent impairment of 9% to the body as a whole and enhanced permanent partial disability benefits pursuant to KRS 342.730(1)(c)1, being the difference between the 20% permanent impairment found by Dr. Owen in 2007 and Dr. Owen's 29% permanent impairment found in 2012.

C. Pursuant to the provisions of KRS 342.730(1)(c)1. Plaintiff is entitled to recover an additional amount of $98.34 per week ($428.57 x

> .09 = $38.57 x .85 = $32.78 x 3.00 = $98.34), beginning on the date he filed his Motion to Reopen on January 30, 2012, and continuing thereafter for a period of 90.1429 weeks from and after said date.

On appeal, Murphy argues the ALJ failed to make a determination of his impairment, including the appropriate factors, and any applicable multipliers pursuant to KRS 342.730 (1)(c)1, or KRS 342.730(1)(c)2 at the time of settlement, contrasted with the similar analysis of his condition at the time of reopening. Murphy also argues the ALJ failed to provide any discussion or explanation of why he rejected Dr. Granacher's report. Finally, Murphy argues the ALJ must determine benefits, and the application of the appropriate factor for his entire impairment at the time of reopening, not just the increase.

In rendering a decision, KRS 342.285 grants the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). The ALJ may draw reasonable inferences from the evidence, reject any testimony, and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979);

Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Although a party may note evidence supporting a different outcome than reached by an ALJ, such is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings are so unreasonable they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 200). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 79 (Ky. 1999).

That said, as articulated by the Court of Appeals in Griffith v. Blair, 430 S.W.2d 337 (Ky. 1968), on a motion to reopen, "[t]he party seeking to increase an award has the burden of proving that there has been a change of condition resulting from the original compensable injury." On reopening, an ALJ must compare the claimant's condition at the time of reopening to his or her condition at the time of the original award in order to determine if a worsening of condition has indeed occurred. In Beale vs. Faultless Hardware, 837 S.W.2d 893 (Ky. 1992), the Kentucky

Supreme Court recognized post-settlement reopenings are treated differently from post-final award reopenings, holding the percentage of occupational disability contained in the settlement agreement is not conclusive of the actual disability on the settlement date. The Supreme Court set forth as follows:

> While a final award of compensation benefits has the same finality as a court judgment, KRS 342.125 provides some relief from the finality of judgments in workers' compensation cases and allows a claim to be re-opened after the award is final under specified circumstances. Keefe v. O.K. Precision Tool & Die Co., Ky. App., 566 S.W. 2d 804 (1978). It is critical to note that a KRS 342.125(3) re-opening treats awards pursuant to approved settlements differently from re-opening awards made pursuant to fully litigated claims. To interpret Parson[3] in the manner implied by the Court of Appeals would be contrary to KRS 342.125(3) which in effect prohibits the applications of *res judicata* and collateral estoppel on a motion to re-open a settled workers' compensation claim. KRS 342.125(3) states:
>
> Where an agreement has become an award by approval of the administrative law judge, and a reopening and review of such an award is initiated, no statement contained in the agreement, whether as to jurisdiction, liability of the employer, nature and extent of disability, or as to any other matter, shall be considered by the administrative law judge as an

[3] Parsons vs. Union Underwear 758 S.W.2d 43 (Ky. App. 1988)

> admission against the interests of any party. The parties may raise any issue upon reopening and review of this type of award which could have been considered upon an original application for benefits.
>
> Therefore, despite the fact that on a motion to re-open the percentage of occupational disability contained in a settlement agreement would not be conclusive as to the actual disability on that date, under Parson such a fact is conclusive in a subsequent claim for a subsequent injury. Clearly, Parson's use of *res judicata* in settled workers' compensation cases exceeds the legislative intent expressed in KRS 342.125(3).
>
> In addition to being contrary to KRS 342.125(3), the application of *res judicata* by the Court of Appeals would undermine the policy of encouraging settlements in workers' compensation cases. Accordingly, Parson is overruled to the extent that in the litigation of a claim for a subsequent injury, it would make *res judicata* a fact contained in an agreement to settle a prior workers' compensation claim. This decision in no way affects the rule that absent a re-opening or the litigation of a claim for a subsequent injury, an approved settlement of workers' compensation claim is final and binding on the parties to the agreement.

Beale at 896.

Consequently, pursuant to a post-settlement motion to reopen alleging a worsening of condition, the ALJ must first determine the claimant's impairment and

commensurate disability on the date of settlement, and determine whether the claimant's condition has subsequently worsened.

In this instance, the ALJ failed to make a determination of Murphy's impairment, and commensurate occupational disability at the time of the 2008 settlement. Likewise, since Murphy had returned to work earning the same or greater wages at the time of the settlement, the ALJ was required to perform an analysis pursuant to Fawbush, supra, which he failed to do. On remand, the ALJ is directed to make a determination of Murphy's impairment rating and commensurate PPD at the time of settlement, and to determine whether any multipliers should have been applied at that time pursuant to KRS 342.730(1)(c)1, or KRS 342.730(1)(c)2. After the ALJ has conducted that analysis, he must then determine if Murphy has had a worsening of his condition, and if so, to what extent.

Murphy next argues the ALJ erred in rejecting Dr. Granacher's report. We also note the ALJ stated he did not find persuasive Dr. Sheridan's report. The ALJ provided no explanation for rejecting either report, other than stating he did not find them persuasive. Therefore there is no information available to permit meaningful review on appeal. Shields v. Pittsburgh and Midway Coal Mining Co.,

634 S.W.2d 440 (Ky. App. 1982). Therefore, on remand, the ALJ is directed to provide an explanation for not considering the reports of either Dr. Granacher or Dr. Sheridan.

Finally, Murphy argues the ALJ erred in utilizing a factor of only .85 on any increased impairment pursuant to KRS 342.730(1)(b). Since 1996, the proper calculation of PPD benefits pursuant to KRS 342.730(1)(b) has been a mathematical function of impairment ratings determined in accordance with the AMA Guides. For that reason, in deciding a claimant's entitlement to benefits under KRS 342.730(1)(b), whether at the time of the original proceedings or on reopening under KRS 342.125(1)(d), an ALJ has "very limited discretion when determining the extent of a worker's permanent, partial disability." Ira A. Watson Dept. Store v. Hamilton, supra.

As the Supreme Court instructed in Roberts Bros. Coal Co. v. Robinson, 113 S.W.3d 181 (Ky. 2003), "an award of permanent partial disability under KRS 342.730(1)(b) is based solely on finding the injury resulted in a particular AMA impairment rating, with the amount of disability being determined by statute." The Court later expounded in Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky. 2006) as follows:

> As amended effective December 12, 1996, KRS 342.125(1)(d) permits an award to be reopened upon evidence of a post-award "change of disability as shown by objective medical evidence of worsening or improvement of impairment ...." A finding of permanent partial or permanent total disability under KRS 342.0011(11)(b) or (c) must be supported by evidence of a permanent disability rating, which requires a permanent impairment rating as determined under the latest available edition of the Guides. KRS 342.0011(36) and KRS 342.730(1)(b) base a worker's permanent disability rating on the individual's AMA impairment rating and a statutory factor. However, KRS 342.0011(11)(c) and KRS 342.730(1)(a) base a finding of permanent total disability on different criteria. A totally disabling injury must result in a permanent impairment rating and a complete and permanent inability to work. *See* Copar, Inc. v. Rogers, 127 S.W.3d 554, 561-62 (Ky.2003); Ira A. Watson Department Store v. Hamilton, supra.

The Court further explained in Chrysalis House, Inc. v. Tackett, 283 S.W.3d 671, 674 (Ky. 2009):

> KRS 342.730(1)(a) through (e) provide income benefits "for disability" caused by a work-related injury. KRS 342.730(1)(b) authorizes a basic income benefit "for partial disability." The benefit is a function of the permanent impairment rating that an injury causes and a statutory factor that is weighted to favor higher impairment ratings, which are likely to have greater occupational effects. KRS 342.730(1)(c) adjusts the benefit to account more accurately for the injury's

> occupational effects by considering the worker's physical capacity to perform the type of work performed at the time of injury, a return to work at the same or a greater wage, age, and educational level.

Hence, pursuant to KRS 342.125(1)(d), absent some other defense, a worker who proves an increased impairment rating under the AMA Guides causally related to the original injury is, by law, entitled to receive an increased award of PPD benefits on reopening as a function of 342.730(1)(b).

Once the ALJ determines the appropriate impairment rating, and commensurate disability at the time of settlement, he must then determine if the impairment rating and commensurate disability increased at the time of reopening. The appropriate factor to be utilized pursuant to KRS 342.730(1)(b) must then be applied to the entire impairment rating, not just the increase. Therefore, the ALJ's application of .85 to an increase in impairment in this instance was improper. Once the ALJ has determined the appropriate impairment rating at the time of settlement, and has added the increased impairment on reopening, if any, he must apply the appropriate factor pursuant to KRS 342.730(1)(b) in arriving at the appropriate PPD rating.

Accordingly, we **VACATE AND REMAND** the Opinion and Order rendered October 8, 2012, and Amended Opinion and Order on Reconsideration rendered November 19, 2012 by Hon. William J. Rudloff, ALJ, for further entry of an amended opinion and order consistent with the views expressed in this opinion.

STIVERS, MEMBER, CONCURS.

SMITH, MEMBER, NOT SITTING.

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